SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MADDEN Justice

PART 11

Index Number : 150622/2013
MITCHELL, CFA, SETH
vs.
NEW YORK UNIVERSITY
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 10-31-13
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is and cross motion are decided IN accordance with the annexed Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: January 8, 2014

HON. JOAN A. MADDEN, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY, PART 11

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SETH MITCHELL,

Index No.: 150622/13

Plaintiffs,

-against-

NEW YORK UNIVERSITY, NYU SCHOOL OF CONTINUING & PROFESSIONAL STUDIES ("SCPS"), MR. JOHN SEXTON, MR. MARTIN LIPTON, ESQ., MS. BONNIE BRIER, ESQ., MR. DENNIS DI LORENZO, MR. THOMAS GRACE, MR. MARC WAIS, MR. JULES MARTIN, MR. LUIS CORDOVA, MR. ERIC CHANDLER, MS. MARCY FERDSCHNEIDER, MS. JESSICA GARET, MR. ROBERT CALAMAI, MS. SUSAN ALEVAS, ESQ., ESQ., MS. TRISH ARBIB, AND JOHN & JANE DOES 1-100,

Defendants.

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JOAN A. MADDEN, J.:

Defendants move pursuant to CPLR 3211(a)(5) and CPLR 3211(a)(7) to dismiss the complaint as time-barred and for failure to state a cause of action. Plaintiff, *appearing pro se*, opposes the motion and cross moves for a default judgment, arguing that defendants failed to timely respond to the complaint. Defendants oppose the cross motion. For the reasons below, the motion is granted, and the cross motion was denied.

Background[1]

Plaintiff is a former student of the New York University School of Continuing and Professional Studies ("SCPS"). This action arises out of the determination of defendant New York University ("NYU" or the "University") to bar plaintiff from the University after plaintiff failed to see a counselor at NYU's mental health center when his behavior allegedly caused one

[1]Unless otherwise noted, the following facts are based on the allegations in the complaint which, for the purposes of this motion, must be accepted as true.

of his instructors to be concerned that he might pose a threat to others in the classroom. The complaint seeks $49 million in damages and asserts causes of action for (1) defamation per se, (2) assault, (3) "purposeful" infliction of emotional distress, (4) attempted false imprisonment, (5) negligence, (6) violation of Freedom of Speech (i.e. First Amendment rights), (7) unjust enrichment, and (8) "front pay" for loss of future earnings.

The underlying events set forth in the complaint begin in August 2012, following the report from the instructor regarding plaintiff's alleged behavior. By letter dated August 22, 2012, Patricia Arbib ("Arbib"), SCPS Director of Student Affairs and Dennis Di Lorenzo ("Di Lorenzo"), Vice Dean of SCPS, informed plaintiff that, due to concerns about his behavior, he would be barred from his courses until he received a mental health clearance from the "NYU Wellness Exchange[2]" (Compl. ¶ 19). The letter, however, did not detail the behavior by plaintiff which gave rise to the University's concerns (id). Plaintiff took the University's concerns "seriously" and attempted to communicate with the Wellness Exchange but those attempts were ignored by defendants (Id. ¶ 20). It is not alleged, however, that plaintiff arranged to see a counselor at the Wellness Exchange to obtain a mental health clearance as requested in the August 22, 2012 letter.

On September 4, 2012, NYU public safety officers "forcefully removed [plaintiff] from class and then the building in front fifty or so witnesses, and demanded that plaintiff get into their vehicle for a drive to 'the health crisis center'" (Id, ¶ 21). Plaintiff refused to get into the vehicle and, instead, immediately called the Wellness Center to complain about the incident (Id., ¶'s 21, 22). As a result of the incident, plaintiff "experienced extremely deleterious physiological

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[2]This is the term plaintiff uses for the NYU student health center.

effects including heart palpitations, slight convulsions and almost fainted as a result of the assault by NYU personnel" ((Id., ¶ 22). A few hours after the incident "[plaintiff] enjoyed his dinner [at a restaurant] and attempted to recover from the severe emotional distress inflicted by NYU personnel" (Id., ¶ 24).

On September 7, 2012, Arbib sent plaintiff an email informing him that a *persona non grata* order had been issued barring plaintiff from the NYU premises. (Id., ¶ 25) On September 27, 2012, plaintiff was purchasing a beverage on the NYU premises when a public safety officer approached him and demanded he present his NYU identification and when plaintiff provided his identification he was "summarily banished from the building in an embarrassing and hostile manner in front of fifty witnesses: while not as severe as the incident on September [4], 2012, plaintiff again suffered severe psychological distress" (Id., ¶ 26) .

When plaintiff attempted to continue his courses on-line, he received a September 28, 2012 email from Mr. Di Lorenzo which stated that plaintiff was a *persona non grata* and was not allowed to take onsite or online courses and that his NYU identification was being inactivated until he visited the Wellness Center (Id., ¶ 28). Plaintiff was also informed by a September 28, 2012 email from his Strategic Communications professor that he had been expelled from the course (Id., ¶ 29). Plaintiff received an email dated October 2, 2012, from Di Lorenzo, directing plaintiff "'to cease any communications of any kind with NYU students, faculty, students and staff [and that] the University was prepared to take legal action against (plaintiff), including enlisting the aid of local law enforcement'" (Id, ¶ 31). On October 3, 2012, plaintiff forwarded the October 2 email from Di Lorenzo to defendant Jules Martin, Vice President of Global Security and Crisis Management, and informed him of the damaging nature of the email, but was

ignored (Id, ¶ 32).

Di Lorenzo left a voice mail for plaintiff on October 19, 2012, indicating an interest in working towards a resolution of the matter but confirming plaintiff's status as a *persona non grata* (Id, ¶ 35). On October 24, 2012, a conference call was held among plaintiff, Di Lorenzo and Arbib in an effort to resolve the matter (Id, ¶ 36). During the call, Di Lorenzo commented on plaintiff's "aberrant behavior and Arbib remained silent, and the conversation ended without a resolution of the matter (Id. ¶'s 36, 37).

On October 25, 2012, Mr. Di Lorenzo offered plaintiff $15,000 in damages in exchange for plaintiff's global release of his claims against defendants through a written settlement offer which plaintiff "rejected as de minimis" (Id, ¶ 38). On October 31, 2012, plaintiff received notice from the "Department of Education stating NYU had listed a separation date of [October 9, 2012] and indicating falsely that plaintiff "withdrew" from NYU (Id, ¶ 40).

Plaintiff commenced this action on January 22, 2013, by filing a summons and complaint. Defendants did not answer the complaint but, instead, on February 19, 2013, served this motion to dismiss on plaintiff.

Plaintiff's Cross motion for a Default Judgment

Plaintiff cross moves for a default judgment against defendants, arguing that defendants did not timely respond to the summons and complaint. This argument is without merit.

Plaintiff served his complaint on NYU, the first defendant served, on January 29, 2013. Under CPLR 320, defendants have twenty days to answer, move, or otherwise respond to complaint from the date of service. Moreover, when the final day of the twenty day period falls on a Saturday, Sunday, or public holiday, the deadline is extended until the following business

day. See General Construction Law § 25-a. In 2013, President's Day was on February 18, 2013, and thus NYU's deadline to appear in the case was on February 19, 2013, the date that defendants served their motion to dismiss. Accordingly, the motion was timely served, and plaintiff's motion for a default judgment must be denied.

Defendants' Motion to Dismiss

Defendants move to dismiss arguing that (1) plaintiff's causes of action which are cognizable only in an Article 78 proceeding, are time-barred, and that in any event, (2) the complaint fails to state a cause of action.

With respect to the first argument, defendants assert that the gravamen of this action is a challenge to defendants' decision to exclude plaintiff from campus after the University became concerned about plaintiff's emotional stability and plaintiff failed to submit to a mental health evaluation. Defendants assert that such a challenge to a University's decision must be brought via an Article 78 proceeding, which is subject to a four month statute of limitations period. See CPLR 217 Defendants note that the complaint alleges that the University declared plaintiff *persona non grata* on September 7, 2012, and that this action was not commenced until January 22, 2013, or more than four months later. Accordingly, defendants argue, the complaint must be dismissed as untimely.

Plaintiff counters that even if the four month statute of limitations applies, it did not begin to run until settlement negotiations were discontinued by defendants' representatives on November 13, 2012. Alternatively, plaintiff argues that statute of limitations did not begin to run on September 7, 2012, as argued by plaintiff, since defendants did not make a final and binding decision regarding plaintiff's status at that time.

In reply, defendants argue that as plaintiff is clearly challenging the University's decision to exclude him from campus and its failure to comply with its own internal policies and procedures, an Article 78 proceeding is the sole vehicle for seeking such relief. Defendants further argue that all of plaintiff's claims arise out of the September 7, 2012 decision to bar him from its facilities and therefore this action commenced four months later is untimely. In addition, defendants assert that settlement negotiations in anticipation of litigation do not toll the limitations period.

As the Court of Appeals has written:

> [A]dministrative decisions of educational institutions involve the exercise of highly specialized professional judgment and these institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal matters.... This jurisprudential guidepost stems from the belief that these institutions are "peculiarly capable of making the decisions which are appropriate and necessary to their continued existence" (*quoting* Gertler v Goodgold, 107 AD2d 481, 485, affd for reasons stated below 66 NY2d 946, supra). Courts retain a "restricted role" in dealing with and reviewing controversies involving colleges and universities (Gertler v Goodgold, supra, at 487; see also, Klinge v Ithaca Coll., 244 AD2d 611, 613). "In these so-called 'university' cases, CPLR article 78 proceedings are the appropriate vehicle because they ensure that the over-all integrity of the educational institution is maintained .... (Klinge v Ithaca Coll., supra, at 613). Thus, a CPLR article 78 proceeding is the route for judicial review of such matters, not a plenary action....

Maas v. Cornell University, 94 NY2d 87 (1999)(certain internal citations and quotations omitted).

To the extent his action challenges the University's determination to exclude plaintiff from University, it involves the "exercise of subjective personal judgment" and is subject to review via an Article 78 proceeding. Gertler v Goodgold, 107 AD2d at 485; see also, Gary v.

N.Y. Univ., 48 A.D.3d 235, 236 (1st Dept. 2008) ("[i]n challenging the termination of her matriculation, along with allegations based on contract . . . and racial discrimination, the pro se plaintiff should have brought a proceeding under *CPLR article 78*, rather than this plenary action.") (citations omitted) (emphasis in original).

Proceedings under Article 78 are subject to a four-month limitations period. See CPLR 217(1); Quintas v. Pace University, 23 AD3d 246 (1st Dept 2005). The statute of limitations begins to run on the date the determination is "final and binding on petitioner." CPLR 217. Here, the decision to terminate plaintiff became "final and binding" on September 7, 2012, when the University decided to exclude plaintiff from the campus unless he submitted to a mental health evaluations. Moreover, neither the settlement negotiations with plaintiff nor the plaintiff's correspondence with the University toll the statute of limitations period. Gertler v Goodgold, 107 AD2d at 948 (defendant's continued negotiations with City did not extend statute of limitations period); Goonewardena v. Hunter College, 40 AD3d 443, 443-444 (1st Dept 2007)(notwithstanding petitioner's ongoing correspondence with University regarding his medical documentation regarding his psychiatric health and his request for reconsideration of his suspension, such a request does not toll the four-month statute of limitations, "even when an agency takes it under review or negotiates with a petitioner over modification of the administrative determination")(internal citations omitted).

Under these circumstances, the court finds that to the extent plaintiff's action challenges the University's decision to bar plaintiff from the University, it should have been brought as an Article 78 proceeding, and is untimely as it was not commenced within four months of the University's determination to exclude him on September 7, 2012.

At the same time, insofar as the gravamen of plaintiff's claims is not based on the University's determination to exclude plaintiff from the University such claims may be properly asserted in a plenary action. Kickertz v. New York University,110 AD3d 268, 276 (1st Dept 2013). However, for the reasons below, the claims are subject to dismissal for failure to state a cause of action.

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the allegations in the complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980).

The first cause of action, for defamation *per se*, is based on statements by various representatives of the University in letters, emails and during a conference call with plaintiff regarding his emotional instability and that he poses a threat to others the University.

Defendants argue that the defamation claim must be dismissed as the allegedly defamatory statements were not published to a third party, which is a requirement of a defamation claim. Moreover, defendants argue that communications between University officials are protected by "a common interest privilege." In addition, defendants note that plaintiff has failed to allege the particular words complained of, or the time, place and manner of the statements.

Plaintiff counters that the statements must have been published to third persons since the public safety officers were given his photograph and told to be on the look out for him. Furthermore, plaintiff argues that the statements are not subject to the common interest privilege as they were made with malice.

The elements of a claim for defamation are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum a negligence standard, and, it must either cause special harm or constitute defamation per se." Dillon v City of New York, 261 AD2d 34, 38 (1st Dept 1999)(citation omitted). CPLR 3016 also requires that "'the particular words complained of be set forth in the complaint.'" Id. In addition, the complaint must allege "the time, place and manner of the false statement and specify to whom it was made." Id.

Here, the defamation claim fails to allege the particular words complained of and is subject to dismissal on this ground. In addition, the claim must be dismissed as plaintiff has failed to satisfy the publication requirement, as the statements at issue were exchanged only between plaintiff and University representatives. Moreover, even if the publication requirement was established based on the alleged communications of the unspecified statements to the public security officers, such statements are protected by the common interest privilege. See Constantine v. Teachers College, 29 Misc3d 1214(A), *10 (Sup Ct NY Co. 2010), aff'd, 93 AD3d 493 (1st Dept 2012)(granting motion to dismiss defamation claim against University arising from University's internal discussion regarding student's alleged plagiarism); see generally, Present v Avon Prods., 253 AD2d 183, 188 (1st Dept), lv dismissed 93 NY2d 1032 (1999).

With respect to the common interest privilege, the Court of Appeals, has written that "so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded" Liberman v Gelstein, 80 NY2d 429, 437 (1992). Although the privilege is inapplicable where the statements are made with malice, malice must be the sole

motivation (Liberman v Gelstein, 80 NY2d at 437), and the allegations in the complaint are insufficient to provide a basis for inferring malice. Gondal v New York City Dept. of Educ., 19 AD3d 141 (1st Dept 2005)(granting motion to dismiss defamation claim based on common interest privilege and finding that "conclusory allegations of malice [are] insufficient to overcome the privilege"); Trachtman v Empire Blue Cross & Blue Shield, 251 AD2d 322 (2d Dept 1998)(same).

The next cause of action alleges that the University's public safety officers committed assault by ejecting plaintiff from the University on two occasions after he violated the exclusion order. With respect to the first incident it is alleged that the University's public safety officers "forcefully removed [plaintiff] from the class and then the building in front fifty or so witnesses" and "demanded that plaintiff get into their vehicle for a drive to the health crisis center" but did not force plaintiff into the vehicle (Complaint ¶'s 21, 23). As for the next incident it is alleged that when plaintiff was purchasing a beverage on the NYU premises he was approached by a public safety officer who demanded plaintiff present his NYU identification and was "summarily banished from the building in an embarrassing and hostile manner in front of fifty witnesses" (Id., ¶ 27).

Defendants argue that the assault claim fails to state a cause of action in the absence of allegations that the efforts to remove him from NYU's premises involved the use of unreasonable force or was motivated by an intent to injure the plaintiff.

In opposition, plaintiff argues that he did not pose a security threat and therefore he was wrongfully removed from the University's premises, and that his public removal was done with the intent to embarrass and humiliate him.

At the outset it must be noted that the complaint lacks a description of the conduct of the public safety officers so that it is unclear whether plaintiff alleges an assault or battery as to the two incidents. However, as discussed below, the complaint is insufficient under either cause of action.

> To plead a cause of action to recover damages for assault, a plaintiff must allege intentional "physical conduct placing the plaintiff in imminent apprehension of harmful contact." Bastein v Sotto, 299 AD2d 432, 433 (2002).... While "[a]n action for an assault need not involve physical injury, but only a grievous affront or threat to the person of the plaintiff" Di Gilio v Burns Intl. Detective Agency, 46 AD2d 650, 650 [1974]; see Reichle v Mayeri, 110 AD2d 694 [1985]), words, without some menacing gesture or act accompanying them, ordinarily will not be sufficient to state a cause of action alleging assault. see Carroll v New York Prop. Ins. Underwriting Assn., 88 AD2d 527, 527 [1982]).

Gould v. Rempel, 99 AD3d 759, 760 (1st Dept 2012). Intent is an essential element of an assault claim. Flamer v. City of Yonkers, 309 NY 114, 116 (1955). On the other hand, "[t]o maintain a cause of action for battery, plaintiffs must prove bodily contact, with intent that was offensive in nature" Hassan v. Marriott Corp., 243 AD2d 406 (1st Dept 1997).

The claim fails to state a cause of action for assault as there is no allegation that the public safety officers intended to place plaintiff in apprehension of harmful contact. Furthermore, that plaintiff was removed from the premises in front of other people and was subject to embarrassment is not a basis for a viable assault claim. See Holtz v. Wildenstein, 261 AD2d 336 (1st Dept 1999)(no assault claim where plaintiff was not put in imminent apprehension of physical contact) .

Likewise, the claim for battery is insufficient for a failure to plead an intent by the safety officers to harm plaintiff by bodily contact. The cause of action also fails as a property owner has

the right to use reasonable force to eject a trespasser from its premises. Noonan v. Luther, 206 NY 105, 108 (1912); Hill v. Greeley Square Hotel Co., 175 AD 421 (1st Dept 1916). However, the use of unnecessary force or evidence of intent to injure as opposed to an intent to guard the owner's property removes the privilege. McGovern v. Weis, 265 AD 367, 370 (4th Dept 1943); see generally 6A NYJur 2d Assault-Civil Aspects §§ 13, 24, 15. Here, even liberally interpreted, it cannot be inferred from the allegations in the complaint that unreasonable force was used to remove plaintiff or that there was an intent to injure plaintiff. In fact, the complaint does not allege that any physical contact was made or that he plaintiff s sustained any injuries. In addition, to the extent plaintiff challenges the University's decision to exclude him from the University, as opposed to the means used to enforce this decision, he is seeking Article 78 relief which, as indicated above, is untimely.[3]

As for the claim of intentional infliction of emotional distress, this cause of action has four elements: (1) extreme and outrageous conduct, (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress, (3) a causal connection between the conduct and injury, and (4) severe emotional distress. Howell v New York Post Co., 81 NY2d 115, 120 (1993). To state such a claim, it must be shown that the alleged conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Murphy v American Home Products Corp., 58 NY2d 293, 303 (1983). In this case, the allegations in the complaint regarding defendants' alleged conduct in connection with the exclusion of plaintiff

[3]Likewise, as the defendants are a private school, plaintiff has no property interest in continuing to attend classes subject to constitutional due process requirements. Mu Chapter of Delta Kappa Epsilon, by Swett v. Colgate University, 176 AD2d 11, 13-14 (3d Dept 1992).

from the University are insufficient to meet this threshold. See e.g Spinale v. Guest, 270 AD2d 39, 40 (1st Dept 2000).

The purported claim for attempted false imprisonment arises out of events allegedly occurring on September 4, 2012, when after removing plaintiff from the building pursuant to the order of exclusion, the public safety officers attempted, but failed, to convince plaintiff to enter their vehicle. To state a claim for false imprisonment, "a plaintiff must show that (1) defendant intended to confine them, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent, and (4) the confinement was not otherwise privileged." Arrington v. Liz Claiborne, Inc., 260 AD2d 267, 267 (1st Dept 1999). Here, as plaintiff does not allege that he was confined to the vehicle, he fails to state a claim for false imprisonment and there is no such claim as attempted false imprisonment.

Plaintiff's claim for negligence is based on allegations that when plaintiff tried to contact defendants regarding the determinations with respect to his conduct, defendants ignored his attempts and refused to settle with him. Thus, plaintiff alleges defendants breached a duty owed to him and violated various provisions of the University Code of Ethical Conduct.

Defendants argue this claim must be dismissed as it seeks untimely Article 78 relief and that defendants do not owe plaintiff any duty within the context of a cause of action for negligence. In opposition, plaintiffs argues that individual defendants owed him various duties in connection with the determination to exclude him the University including a duty to work with him to resolve the matter. By failing to attempt such a resolution, plaintiff contends that the individual defendants violated various Bylaws and rules of the University.

As a preliminary matter, insofar as the negligence claim challenges the University's

determination to exclude plaintiff and defendants' rejection of plaintiff's attempts to alter this determination, it seeks relief in the nature of an Article 78 proceeding and is untimely. Goonewardena v. Hunter College, 40 AD3d at 443-444. Moreover, even if it could be inferred from the complaint that plaintiff alleges negligence by defendants beyond the scope of Article 78 review, the claim does not state a cause of action. To assert a viable claim for negligence, a plaintiff must show " (1) the existence of a duty flowing from defendant to plaintiff; (2) a breach of this duty; (3) a reasonably close causal connection between the contact and the resulting injury; and (4) actual loss, harm or damage. " Febesh v. Elcejay Inn Corp., 157 AD2d 102, 104 (1st Dept 1990). Here, the individual defendants owe no duty to plaintiff with respect to discretionary determinations and, in any event, to the extent the claim seeks to recover for "educational malpractice" there is no such claim in New York. See Kickertz v. New York University, 110 AD3d at 279; Introna v. Huntington Learning Centers, 78 AD3d 896, 899 (2d Dept 2010). Accordingly, the negligence claim must be dismissed.

The next cause of action alleges violation of plaintiff's right to Free Speech in violation of the First Amendment of the U.S. Constitution based on the Cease and Desist email sent by Di Lorenzo accusing plaintiff of communicating in "an alarming fashion" with members of the NYU community and directing plaintiff to cease all communications with NYU faculty, students and staff (Complaint, ¶s 30-34).

This claim is unavailing. "Because the United States Constitution regulates only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes 'state action.'" U.S. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-

CIO, 941 F2d 1292, 1295-1296 (2d Cir 1991)(citations omitted). Here, as NYU is a private university and the individual defendants are its employees, the challenged conduct alleged in the complaint does not constitute "state action" subject to constitutional protection. See Johnson v. City of New York , 669 Fsupp 444, 450 (SD NY 2009)(noting that NYU and its employees are private parties and not state actors). Furthermore, while plaintiff asserts that he "anticipates" adding certain state actors as additional defendants, any such amendment, even if permitted by the court, would not give rise to liability with respect to the named defendants.

In his cause of action for unjust enrichment, plaintiff alleges that the University committed the torts alleged in the complaint "which resulted or were intended to result in gains of assets, revenues, trade secrets, intellectual property and rightful inheritances which justly belonged to plaintiff [and]... was intended to weaken plaintiff's physical or mental state or create the appearance of such with the goal of injecting themselves into plaintiff's personal or business activities or affairs under the guise of being plaintiff's authorized representatives" (Complaint ¶ 50).

To prevail on a claim of unjust enrichment, the plaintiff must establish that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against good conscience and equity to permit the other party to keep what is sought to be recovered. Cruz v McAneney, 31 AD3d 54, 59 (2d Dept 2006). Under this standard, the complaint fails to state a cause of action for unjust enrichment as there are no specific allegations that defendants were enriched at plaintiff's expense.

Plaintiff's final claim is for "Front pay" is based on allegations that defendants' tortious conduct destroyed plaintiff's chances for completing his degree and pursuing his PhD and

therefore "hampers his future personal and professional goals." (Complaint, ¶ 51). In support of this claim, the complaint cites Shore v. Federal Exp. Corp., 777 F2d 1155 (6th Cir. 1985), which involved an action arising out of sex discrimination in the work place which resulted in the plaintiff's termination. With respect to an award of front pay, the Court of Appeals for the Sixth Circuit noted that the remedy may be appropriate "under the Age Discrimination in Employment Act...[upon evaluating] ...whether the award will aid in ending illegal discrimination and rectifying the harm it causes." Id., 1159-1160 (citations omitted).

As this action does not arise out discrimination in employment, the cause of action for "Front pay" must be dismissed.

Conclusion

In view of the above, it is

ORDERED that the motion to dismiss is granted and the Clerk is directed to enter judgment dismissing the complaint in its entirety; and it is further

ORDERED that the cross motion for a default judgment is denied.

DATED: January 8, 2014

J.S.C.

HON. JOAN A. MADDEN
J.S.C.